Filed 9/28/09 P. v. Taumoeanga CA1/4

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE, Plaintiff and Respondent, v. TEVITA TAUMOEANGA, Defendant and Appellant.	A120724 (Contra Costa County Super. Ct. No. 05-061135-0)

A jury found appellant Tevita Taumoeanga guilty of second degree robbery, battery causing serious bodily injury, two counts of dissuading witnesses by force or threat, and two counts of misdemeanor battery. (Pen. Code,[1] §§ 136.1, subd. (c)(1), 211, 212.5, subd. (c), 242, 243, subds. (a), (d).) The trial court sentenced him to four years in prison: the midterm of three years for the robbery; a consecutive one year (one-third the midterm) for the battery; the midterm of three years for counts four and five (dissuading witnesses by force), stayed pursuant to section 654; and concurrent six-month terms for each of the misdemeanor counts. Additionally, the court imposed a restitution fine of $4,800 and a parole revocation restitution fine of $4,800. A minute order indicates that the court referred appellant to the Office of Revenue Collections for $500 in attorney fees.

On appeal, he attacks the restitution fine and the referral, arguing the fine should be reduced because it was improperly calculated, and the referral for attorney fees should

[1] Unless otherwise noted, all statutory references are to the Penal Code.

be stricken from the record because the court did not make such an order. He further urges that the abstract of judgment be corrected to reflect that both counts four and five were stayed. We agree, and the Attorney General agrees to some—but not all—assertions of error. Accordingly, we reverse the sentence as to these sentencing issues only, and remand for appropriate action in conformance with this opinion.

I. FACTS

Early in the morning of August 13, 2006, appellant and some friends gathered on the sidewalk outside a Denny's restaurant on Willow Pass Road in Concord. Victims Robert Navarro, Gabriel Lopez, and Carlos Lopez arrived at Denny's and attempted to walk past the group to enter the restaurant. As they did, one of the males in the group punched Carlos Lopez. Navarro then tried to help Lopez, but another male in the group hit Navarro and knocked him to the ground as well. Appellant and the group proceeded to kick both Carlos Lopez and Navarro while they were on the ground. The victims suffered severe physical injuries.

Appellant testified, admitting to his involvement in the altercation. He confessed that he, along with one of the other males in the group, knocked Carlos Lopez to the ground. Appellant then walked over to Navarro and kicked him in the face while he was on the ground. Afterward, appellant grabbed Navarro's wallet, removed his identification card, and yelled to the group, "I got the ID. Let's leave." Appellant testified that the reason he told the victims that he took the identification card was to scare them and to "throw them off just so they wouldn't call the cops."

The police approached appellant outside his apartment and detained him. Witnesses identified appellant as the person who took Navarro's wallet, and the police found Navarro's identification card in appellant's hand.

The jury convicted appellant of four felonies and two misdemeanors. The trial court entered sentence as stated above. This appeal followed.

II. DISCUSSION

A. *Restitution Fine*

Appellant first charges that the trial court erroneously calculated the restitution fine and corresponding parole revocation fine under section 1202.4, subdivision (b),[2] by including the two stayed felony convictions as well as the two misdemeanor convictions when applying the statutory formula. Imposing the restitution fine of $4,800, the trial court reasoned as follows: "Additional terms, restitution fine. That's 200 dollars times the number of counts, which is six, times the number of years which is four. That gets us to 4,800 dollars for the restitution fine. [¶] And I think that's in keeping with the gravity of the crime. [¶] I have little evidence as to Mr. Taumoeanga's ability to pay, although I do have evidence that he's going to have a job or at least have one waiting for him if he was to come out on probation. [¶] And I think he's capable of paying that because he's had jobs in the past."

1. *Erroneous Inclusion of Stayed Counts*

Although victim restitution is *mandated* by the California Constitution[3] and section 1202.4, the trial court retains discretion in fixing the amount of the award. (*People v. Rowland* (1997) 51 Cal.App.4th 1745, 1751.) The court may set a felony restitution fine according to the formula set forth in section 1202.4, subdivision (b)(2), namely the base of $200 multiplied by the number of years of imprisonment multiplied by the number of felony counts of which a defendant is convicted. Recently, the court in

---

[2] This statute reads in part: "(b) In every case where a person is convicted of a crime, the court shall impose a separate and additional restitution fine . . . . [¶] (1) The restitution fine shall be set at the discretion of the court and commensurate with the seriousness of the offense, but shall not be less than two hundred dollars ($200), and not more than ten thousand dollars ($10,000), if the person is convicted of a felony, and shall not be less than one hundred dollars ($100), and not more than one thousand dollars ($1,000), if the person is convicted of a misdemeanor. [¶] (2) In setting a felony restitution fine, the court may determine the amount of the fine as the product of two hundred dollars ($200) multiplied by the number of years of imprisonment the defendant is ordered to serve, multiplied by the number of felony counts of which the defendant is convicted." (§ 1202.4, subd. (b)(1), (2).)

[3] California Constitution, article I, section 28, subdivision (b)(13).

People v. Le (2006) 136 Cal.App.4th 925, 933-934 concluded that the ban on multiple punishments articulated in section 654 applies to a restitution fine imposed under section 1202.4 because such a fine constitutes a criminal penalty. Therefore, the section 654 ban is violated if the trial court considers a stayed felony conviction as part of its calculation of the restitution fine under the section 1202.4, subdivision (b)(2). The Attorney General concedes, and we agree, that because the trial court stayed punishment on counts four and five pursuant to section 654, it should not have included those counts in applying the statutory formula. Thus the fine should be reduced by $1,600 (two stayed counts multiplied by four years' imprisonment multiplied by $200).

2. *Erroneous Inclusion of Misdemeanor Convictions*

Appellant further maintains that the trial court misconstrued section 1202.4, subdivision (b)(2) as calling for the inclusion of misdemeanor convictions in the statutory formula for calculating a restitution fine. Interpretation of a statute presents a pure question of law, subject to de novo review on appeal. (*People v. Bergen* (2008) 166 Cal.App.4th 161, 167.) It is a fundamental rule of statutory construction that a court should determine the intent of the Legislature so as to effect the statutory purpose, and in determining intent, the court turns first to the words used. When the language of the statute is clear and unambiguous, there is no reason to resort to construction and courts should not indulge in it. (*People v. Overstreet* (1986) 42 Cal.3d 891, 895.)

Here, the language of section 1202.4, subdivision (b) is clear and unambiguous. Subdivision (b)(1) sets out separate ranges for restitution fines for both felony and misdemeanor convictions. Subdivision (b)(2) *applies only to the setting of a felony restitution fine*, specifying a formula that may be used in determining the appropriate amount. In turn that formula calls for multiplying $200 by the years of imprisonment ordered and "the number of *felony counts* of which the defendant is convicted." (§ 1202.4, subd. (b)(2), italics added.) It is clear that the statute applies only to restitution fines for felony convictions, and that the formula employs only felony counts—not misdemeanor counts—to arrive at the amount of the fine.

Moreover, the $1,600 restitution fine imposed in reliance on the two misdemeanor counts—two counts multiplied by four years multiplied by $200—was unauthorized because the ceiling for a fine based on a misdemeanor conviction is $1,000. (§ 1202.4, subd. (b)(1).) In the case of a felony conviction, where the defendant stands convicted of several felony offenses in one proceeding, the restitution fine is not imposed on each count. Rather, one fine is imposed taking into account all the offenses in the proceeding. (*People v. Holmes* (2007) 153 Cal.App.4th 539, 547.) By analogy, the same reasoning would apply to imposition of a fine for misdemeanor convictions occurring in one proceeding, in which case the statutory maximum would be $1,000, not $1,600.

It is apparent from the record that the trial court improperly used the misdemeanor convictions in applying the statutory formula crafted for determining the amount of a felony restitution fine, and in any event the $1,600 in fines attributed to applying the two misdemeanor convictions is unauthorized as in excess of the $1,000 ceiling. When the court chooses to use a statutory formula, it must do so correctly. Accordingly, a restitution order resting on an improper application of the formula amounts to an abuse of discretion. We therefore remand for the trial court to exercise its discretion in imposing a restitution fine for the misdemeanor convictions.

The People counter with several contentions. First, they argue that appellant has waived this claim of error by failing to object. Among other authority, they cite *People v. Scott* (1994) 9 Cal.4th 331. There the Supreme Court explained that the waiver doctrine applies to claims that the trial court failed to properly make or articulate its discretionary sentencing choices. (*Id*. at p. 353.) However, legal error resulting in an unauthorized sentence may be raised for the first time on appeal. An unauthorized sentence is one that "could not lawfully be imposed under any circumstance in the particular case. . . . [S]uch error is 'clear and correctable' independent of any factual issues presented by the record at sentencing." (*Id.* at p. 354.) On the other hand, claims deemed waived on appeal entail "sentences which, though otherwise permitted by law, were imposed in a procedurally or factually flawed manner." (*Ibid*.)

It is evident that the trial court resorted to the statutory formula to set the restitution fine for the combined offenses. Having chosen to use the formula, it committed legal error in including the two misdemeanor convictions in its calculation. The section 1202.4, subdivision (b)(2) formula does not apply to misdemeanor convictions, nor does it authorize a court to include the number of misdemeanor convictions as a multiplier to arrive at a fine for felony convictions. The question of the application of the statutory formula to misdemeanor convictions is solely a matter of statutory interpretation and does not turn on any facts of the case. Moreover, the resulting misdemeanor fine in the amount of $1,600 could not lawfully be imposed under any circumstances because the maximum misdemeanor fine is $1,000. The court exceeded its statutory authority in imposing the misdemeanor fine and therefore appellant's failure to object did not result in a waiver of the issue. (*People v. Chambers* (1998) 65 Cal.App.4th 819, 823 [failure to object to imposition of two separate restitution fines for same conviction is not waiver].)

The People also contend that section 1202.4, subdivision (b)(1) authorizes a felony restitution fine of $3,200 for two unstayed felonies and thus was within the maximum allowed in the trial court's discretion. The problem with this approach is that the trial court relied solely on the subdivision (b)(2) statutory formula, not subdivision (b)(1). A defendant is entitled to a sentencing decision in which the sentencing court exercises its " 'informed discretion.' " If the court is unaware of the scope of its discretionary powers, it cannot exercise that " 'informed discretion.' " (*People v. Belmontes* (1983) 34 Cal.3d 335, 348, fn. 8.)

The People further argue that reading the statute as a whole, the trial court was not prohibited from fashioning a restitution amount attributable to both felony convictions and misdemeanor convictions. The argument is this: Subdivision (b)(1) provides that the amount of restitution is discretionary, subdivision (d)[4] delineates the appropriate factors

[4] Section 1202.4, subdivision (d) provides that in setting the amount of a fine in excess of the minimums announced in subdivision (b)(1), "the court shall consider any relevant factors including, but not limited to, the defendant's inability to pay, the

to consider when exercising that discretion, and here the trial court commented that the amount was fixed in "keeping with the gravity of the crime." However, again, the court resorted to the formula, misunderstood and misapplied it, and did not just pick a number between $200 and $10,000.

Finally, the People insist that considering both felonies and misdemeanor counts in setting the statutory fine is in keeping with the legislative purpose of the statutory formula. The statutory formula was added by amendment in 1995. (Stats. 1995, ch. 313, § 5.) The Legislative Counsel's Digest explained: "Existing law sets forth procedures under which a restitution fine is imposed upon a person convicted of a crime . . . . [¶] This bill would add provisions relating to the criteria used to set the restitution fine required under certain of these procedures . . . ." (Legis. Counsel's Dig., Assem. Bill No. 817 (1995-1996 Reg. Sess.) Stats. 1995, ch. 313.) From this "purpose," they conclude: "Thus, where there are multiple convictions in a single case . . . , the fact of each conviction can be taken into account in setting the fine."

We disagree. The criteria for setting a felony restitution fine when *the court uses the subdivision (b)(2) formula* are straightforward and unambiguous: Starting with the statutory minimum of $200, the court may use as multipliers (1) the number of years of imprisonment and (2) the number of *felony counts* for which defendant is convicted. We agree that these criteria do, as the People contend, provide one measure of "the seriousness of the offense," which is the guiding principle for determining the amount of restitution within the prescribed range. (§ 1202.4, subd. (b)(1).) However, we cannot read into the statute an additional multiplier based on the number of misdemeanor counts for which defendant is convicted in a given case.

---

seriousness and gravity of the offense and the circumstances of its commission, any economic gain derived by the defendant as a result of the crime, the extent to which any other person suffered any losses as a result of the crime, and the number of victims involved in the crime."

B. *Referral for Attorney Fees*

Appellant also challenges the order referring him to the Office of Revenue Collections for $500 in attorney fees. He is adamant that we must strike the order because the matter was not addressed at the January 15, 2008 sentencing hearing, but only appeared in the subsequent minute order. We agree.

1. *Governing Law*

Section 987.8, subdivision (b) provides that where a defendant receives legal assistance through a public defender or court-appointed private counsel, "upon conclusion of the criminal proceedings . . . , the court may, after notice and a hearing, make a determination of the present ability of the defendant to pay all or a portion of the cost thereof. The court may, in its discretion, hold one such additional hearing within six months of the conclusion of the criminal proceedings. *The court may, in its discretion, order the defendant to appear before a county officer designated by the court to make an inquiry into the ability of the defendant to pay all or a portion of the legal assistance provided*." (Italics added.)

Pursuant to subdivision (f) of section 987.8, the trial court must inform a defendant that he or she might be liable for the costs of court-appointed counsel. Specifically, this statute states: "Prior to the furnishing of counsel or legal assistance by the court, the court shall give notice to the defendant that the court may, after a hearing, make a determination of the present ability of the defendant to pay all or a portion of the cost of counsel. The court shall also give notice that, if the court determines that the defendant has the present ability, the court shall order him or her to pay all or a part of the cost. The notice shall inform the defendant that the order shall have the same force and effect as a judgment in a civil action and shall be subject to enforcement against the property of the defendant in the same manner as any other money judgment." (*Ibid*.)

2. *Trial Court Proceedings*

Appellant was arraigned on September 21, 2006. At that time the trial court did not inform appellant that he might be responsible for the costs of counsel pursuant to section 987.8, subdivision (f).

The probation officer's report did not include any recommendation concerning payment of attorney fees.

At the January 15, 2008 sentencing hearing, there was no mention that an order for attorney fees might be imposed, and no referral was made to the Office of Revenue Collections. Nonetheless, the minute order for that hearing reflected: "The defendant is referred to Office of Revenue Collections for $500.00 in Attorney Fees for the services of the Public Defenders Office."

On February 11, 2008, the court held a brief hearing to correct presentence custody credits. At that time the court noted that the clerk's office had lost "the original attorney's fees bill. Mr. Taumoeanga has his, but he's the only one with [a] copy. So we're going to end up doing a duplicate." The prosecutor stated: "We'll be sure to note this is a duplicate, so he won't be charged twice." Nothing more was mentioned about attorney fees.

3. *Analysis*

The record reveals that the requirements of section 987.8 have not been met. First, there is no record that appellant received the required subdivision (f) notice. The People argue that "it can be fairly presumed" that appellant was aware of the possibility that the court would make a future determination about his ability to pay such fees, citing Evidence Code section 664 (presumption that official duty regularly performed). However, the augmented record shows that no such mention was made at arraignment when representation by the public defender commenced, and the People can point to no time in the proceedings where such notice was given.

Second, the court's oral pronouncement of judgment at the sentencing hearing did not reflect imposition of any attorney fee or referral to a county officer for inquiry into the ability to pay. The minute order *added* to the oral pronouncement of judgment the element of referral for a $500 attorney fee, a provision at total odds with the oral pronouncements. "The record of the oral pronouncement of the court controls over the clerk's minute order . . . ." (*People v. Farell* (2002) 28 Cal.4th 381, 384, fn. 2.)

Third, the People's argument that appellant has waived the issue by not objecting at the February 11, 2008 hearing is not sound. The purpose of that hearing was to correct the presentencing credits. The court's comment that the original attorney fees bill had been lost constituted neither a referral to the Office of Revenue Collections for $500 in fees nor a direct order imposing fees. As the Supreme Court has stressed, "counsel must have a 'meaningful opportunity to object [which] can occur only if, during the course of the sentencing hearing itself and before objections are made, the parties are clearly apprised of the sentence the court intends to impose . . . .' " (*People v. Gonzalez* (2003) 31 Cal.4th 745, 748, quoting *People v. Scott, supra*, 9 Cal.4th at p. 356.)

C. *Correction of Abstract of Judgment*

Appellant points out that the February 11, 2008 amended abstract of judgment incorrectly shows that only count four, but not count five, was stayed. As both were stayed, the Attorney General concedes that the abstract of judgment should be amended to reflect that count five was also stayed.

III. DISPOSITION

We reverse the sentence as to the restitution fine and the referral for $500 in attorney fees and remand the cause to the superior court to (1) reduce the restitution fine imposed under the section 1202.4, subdivision (b)(2) formula to $1,600 to reflect the felony convictions stayed pursuant to section 654, as well as the two misdemeanor counts that were improperly included in the calculations; (2) reduce the corresponding parole revocation restitution fine accordingly; (3) determine and impose the proper amount of the restitution fine and parole revocation restitution fine for the two misdemeanor counts, not to exceed $1,000; (4) amend the amended abstract of judgment (A) to show that both counts four and five were stayed and (B) to reflect the corrected amounts of the restitution fine and parole revocation restitution fine; (5) strike the notation in the January 15, 2008 minute order that states, "The defendant is referred to Office of Revenue Collections for $500.00 in Attorney Fees for the services of the Public Defenders Office"; and (6) forward a certified copy of the further amended abstract of judgment to the Department of Corrections and Rehabilitation.

_____
Reardon, Acting P.J.

We concur:

_____
Sepulveda, J.

_____
Rivera, J.